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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LEWIS WARRON BROWN II,

Defendant and Appellant.

2d Crim. No. B209743
(Super. Ct. No. 2005009991)
(Ventura County)

Lewis Warron Brown II appeals from the judgment entered after a jury convicted him of first degree murder (Pen. Code, §§ 187, subd. (a), 189)¹ and assault with a firearm (§ 245, subd. (a)(2)) with special findings that he personally discharged a firearm causing death (§ 12022.53, subd. (d)) and personally inflicted great bodily injury (§ 12022.7, subd. (a).) The trial court sentenced appellant to 50 years to life state prison.² We affirm.

¹ All statutory references are to the Penal Code unless otherwise stated.

² Appellant was sentenced to 25 years to life on count 1 for murder, plus 25 years to life on the firearm enhancement. On count 2 for assault with a firearm, the trial court imposed a three year sentence, staying the sentence and great bodily injury enhancement pursuant to section 654.

Facts

Viewed in the light most favorable to the judgment, the evidence shows that appellant murdered fellow gang member Bruce Barksdale on March 8, 2005, after Barksdale stopped paying "rent" on a drug cell phone. Before moving to Las Vegas, appellant sold narcotics in Oxnard using the cell phone to take customer orders. In January 2005, Bruce Barksdale took over the drug business and agreed to pay appellant \$400 or \$500 a month for the cell phone.

Barksdale and appellant belonged to Black Mafia Gang (BMG), a money-oriented gang whose primary purpose was to gain power and respect with money. Gang members sold drugs, their main source of income, and referred to BMG as the "MOB," which stands for "money over bitches."

After appellant moved, Barksdale complained that he was not making money and stopped paying cell phone rent. The weekend before the murder, appellant attended a party in Las Vegas and said that Barksdale was "taking food from [his] kids' mouths." Appellant said that he had to go back to Oxnard and "handle" Barksdale.

On March 4, 2005, appellant called Jesse Taylor and said that was coming back to Oxnard to talk to Barksdale about money and a cell phone. Appellant said that he might have to "fillet" Barksdale.

On the afternoon of March 8, 2005, appellant visited Taylor's house in Oxnard. Appellant had a nine millimeter semiautomatic handgun, called Barksdale, and said that he had money for him. Barksdale was partying with gang members at the Channel Islands Motel and agreed to meet him there.

Taylor gave appellant a ride, dropped him off in an alley, and picked him up after purchasing gas at a Thrifty gas station. John Westbrook Jr., a BMG gang member, sat in the front passenger seat and appellant sat in the back seat.

Taylor, Westbrook, and appellant arrived at the motel at about 7:40 p.m. They parked next to a white Ford Taurus just as Barksdale and Sofia Shua were getting into the vehicle.

Appellant exited Taylor's car, walked around the rear of the Ford Taurus, and shot Barksdale in the face. The bullet went through Barksdale's cheek, striking Shua in the left knee. Barksdale tried to climb into the backseat. Appellant opened the left rear passenger door and shot Barksdale twice in the head.

Taylor and Westbrook yelled "What the hell's going on?" Fearing that appellant would shoot them, Taylor and Westbrook tried to back up and leave. Appellant jumped into Taylor's car and ordered him to "Go, go, go."

Varice Stewart, Barksdale's best friend, saw the shooting and chased appellant out of the motel parking lot. Stewart rammed Taylor's car, causing it to hit another vehicle and stop.

Appellant jumped out and ran towards a park. Taylor and Westbrook fled in the opposite direction.

Stewart ran back to the motel, helped Shua, and waited for the police. Barksdale was dead, sprawled out in the Taurus. Stewart identified himself to the police and left because he had outstanding warrants.

A motel surveillance camera photographed part of the shooting and the car chase, but not the shooter. Police officers found appellant's cell phone and a cigarette with appellant's DNA in the back seat of Taylor's car. Appellant's DNA was also on the Ford Taurus door handle in which Barksdale was shot. In the car trunk, officers found a Nokia cell phone used to make drug sales. The cell phone was registered in appellant's name.

Appellant fled to Las Vegas where he was arrested several weeks later.

The shooting witnesses -- Stewart, Shua, Westbrook, and Taylor -- were members or associates of the BMG gang and reluctant to cooperate with the police. Each of them, however, identified appellant as the shooter.

In opening statement, appellant admitted that Barksdale was a BMG gang member, that Barksdale was killed by a gunshot to the head, that Taylor, Westbrook, Stewart and Shua were there, and the car chase "is not at issue." Defense counsel argued

that that the only real issue, "the 64-million-dollar-question," was whether the prosecution could prove beyond a reasonable doubt that appellant was the shooter.

Gang Evidence

Appellant contends that the gang evidence, which was admitted in the prosecution's case in chief, violated his due process rights. The trial court, in overruling appellant's Evidence Code section 352 objection, found that the gang evidence was admissible to prove motive.

Appellant did not object on due process grounds and is precluded from raising the argument for the first time on appeal. (Evid. Code, § 353; *People v. Raley* (1992) 2 Cal.4th 870, 892.) If appellant believed "that the trial court should engage in some sort of due process analysis that was different from the Evidence Code section 352 analysis, he could have, and should have made this clear as part of his trial objection. He did not do so. Accordingly he may not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in his Evidence Code section 352 argument." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

Waiver aside, appellant claims that the gang evidence was irrelevant and denied him a fair trial. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 217.) We reject the argument because the evidence was highly relevant to prove motive. "Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to the guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 [gang evidence admissible to prove intent and motive].)

Appellant complains that the gang evidence was inflammatory because the jury was told BMG gang members sold drugs, carried weapons, and committed

carjackings and violent crimes "all the way up to and including murder." Evidence was received that appellant's gang moniker was "Maniac" and that gang members sold drugs to acquire money and respect. A gang expert testified that BMG gang members placed a priority on responding violently to signs of disrespect, even against fellow gang members. If a gang member was disrespected and retaliated, it was important that he or she do so in front of other gang members who could tell others.

The gang evidence was relevant to show that appellant's motive was not just money but to save face after Barksdale stopped paying cell phone rent. (See e.g., *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) "Case law holds that where evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial. [Citations.]" (*People v. Martin* (1994) 23 Cal.App.4th 76, 81.)

Citing *People v. Albarran*, *supra*, 149 Cal.App.4th 214, appellant argues that the gang evidence rendered the trial fundamentally unfair. In *Albarran*, the defendant was convicted of attempted murder, shooting at an inhabited dwelling, and attempted kidnapping for carjacking. The prosecution argued that defendant committed the crimes to gain respect and to "earn one's bones" in the gang but the only evidence to support the "respect motive" was defendant's gang affiliation. (*Id.*, at p. 227) The Court of Appeal reversed because the gang evidence was inflammatory and there was "nothing inherent in the facts of the shooting to suggest any specific gang motive." (*Ibid.*)

Unlike *Albarran*, the murder victim (Barksdale), appellant, and the shooting witnesses were all members or associates of the BMG gang. Appellant sold narcotics to gain respect and power in the gang, and carried out the shooting at a motel used by the gang. Less than a week before the shooting, appellant told gang members and associates that he would return to Oxnard to take care of Barksdale. True to his word, appellant shot and killed Barksdale in front of gang members and associates who knew Barksdale.

The gang evidence was admissible to show motive and to show why the witnesses feared retaliation. (See *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1368.)

"[T]estimony about what it meant to be a 'rat' in gang culture was relevant to help the jury understand discrepancies between some of the witnesses' statements to the police and their testimony at trial. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 413-414.)

The gang evidence further explained why Taylor did not warn Barksdale. When appellant said that he intended to "fillet" Barksdale, Taylor assumed it would be a fistfight. According to Taylor, "[e]very friend does that. If you got a problem with a friend, you guys usually go to the park and fight." Taylor knew that snitching was frowned upon by the gang and would be met with violent retaliation.

The trial court found that "the facts of this case are just permeated with this gang. Every person who's going to testify, the victim, Mr. Brown – everybody is a gang member. . . . [¶] . . . [I]f I sanitize this case, the jury would say this – this makes absolutely no sense to us why this thing occurred the way that it did. It has no context. It has a great deal of context on the issue of motive [¶] . . . [¶] . . . [T]he gang information is relevant. It goes directly to motive, the why in this case."

Appellant claims the gang evidence was inflammatory but used the same evidence to cross-examine and discredit prosecution witnesses who were gang members or associates, dealt drugs, lied to the police on prior occasions, and committed crimes to enhance their status in the gang. Even if the gang evidence was excluded during the prosecution's case in chief, the jury would have learned that appellant was a drug dealer, that he sold the drug business to Barksdale and charged rent for the cell phone, that appellant and Barksdale belonged to the same gang, and that appellant conspired with gang members and associates to shoot Barksdale. The jury would have also heard that many of the witnesses were so frightened of appellant that they moved.

The jury was instructed that the gang evidence could be considered to establish motive and to evaluate the credibility of a witness, but "[y]ou may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (CALCRIM 1403.) The trial court warned the jury not to "let bias, sympathy, prejudice,

or public opinion influence your decision." (CALCRIM 200.) It is presumed that the jury understood and followed the instructions. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1326.)

Ineffective Assistance of Counsel

The trial court gave a standard CALCRIM 372 flight instruction which stated: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and important of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Appellant asserts that he was denied effective assistance of trial counsel because counsel did not ask for an instruction that Stewart's, Westbrook's, and Taylor's flight could be considered as consciousness of guilt. (See *People v. Henderson* (2003) 110 Cal.App.4th 737, 741.) To prevail on the claim, appellant must show deficient representation and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) "A defendant must prove prejudice that is a "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

In *People v. Henderson, supra*, 110 Cal.App.4th 737, the Court of Appeal held that the failure to give a pinpoint instruction on flight by a third party was harmless. (*Id.*, at p. 744.) "The trial court did inform the jury of the purpose of the third party defense evidence, namely to address the question of whether the prosecution had proved identity of the perpetrator beyond a reasonable doubt. Further, trial counsel argued the matter of the alleged flight of the third party during closing arguments. Thus the jury was clearly aware that the conduct of the third party was important in evaluating the issue of identity." (*Ibid.*)

Appellant asserts that the jury should have been instructed Stewart's, Taylor's and Westbrook's flight was relevant to prove that one of them was the shooter.

We reject the argument because there was no evidence that anyone other than appellant shot Barksdale.

Stewart did not flee, but tried to stop the shooter and returned to the crime scene and waited for the police.

Taylor and Westbrook witnessed the shooting, feared they would be shot, and tried to back out of the parking lot. Appellant ordered them to drive but Stewart rammed the car. Appellant ran towards a park and Taylor and Westbrook ran in the opposite direction.

Defense counsel, for tactical reasons, may not have requested a flight instruction with respect to Taylor and Westbrook because it would undermine the defense theory that Stewart chased Taylor's car, not to catch a killer, but to chase away witnesses to the murder. The defense theory was that Stewart helped Barksdale sell drugs but received no money and wanted to murder Barksdale. Counsel argued that Stewart was in the same gang and "[t]his is a gang thing about respect and about something else. [¶] . . . If this is a money thing, if this is over money, Stewart has the motive at least as much as Mr. Brown."

An alternative defense theory was that Taylor and Westbrook were accomplices and their identification of appellant as the shooter could not be trusted.³ Defense counsel argued that if Taylor was the getaway driver, the jury could not convict based on Taylor's testimony alone.

Counsel had no duty to request an instruction that would compromise alternative defense theories. (*People v. Horning* (2004) 34 Cal.4th 871, 905; *Woratzek v. Ricketts* (9th Cir., 1987) 820 F.2d 1450, 1453-1455.) Nor was appellant entitled to a

³ Defense counsel referred to a CALCRIM 334 accomplice instruction which stated that before the jury could consider Taylor's and Westbrook's testimony, it had to decide whether Taylor and Westbrook were accomplices to the murder. The instruction warned that: "Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution."

third party culpability instruction based on speculation that Stewart had the motive and opportunity to commit the crime. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) A trial court may refuse to give a pinpoint instruction that is argumentative, duplicates other instructions on reasonable doubt, or is not supported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.,4th 515, 558; *People v. Gutierrez, supra*, 45 Cal.4th at pp. 824-825.)

In *People v. Henderson, supra*, 110 Cal.App.4th at page 742, the Court of Appeal noted that a third party flight instruction would be difficult to draft because the standard flight instruction "would have to be totally rewritten." The same problem exists here. Appellant fails to explain how counsel could draft an instruction that would not undermine defense theories presented at trial. A third party flight instruction would have been no help absent evidence that Stewart possessed, pointed, or fired a nine millimeter handgun at Barksdale.

The jury was instructed "that the prosecution had to prove [appellant's] guilt beyond a reasonable doubt, and the jury knew from defense counsel's argument the defense theory that [Stewart], not [appellant], committed the crimes." (*People v. Earp* (1999) 20 Cal.4th 826, 887.) The jury not only convicted appellant of first degree murder but found that appellant personally and intentionally discharged a firearm causing Barksdale's death. Had a third party flight instruction been requested and given, it is not reasonably probable that the jury would have reached a different conclusion. (*Ibid.*)

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Edward F. Brodie, Judge
Superior Court County of Ventura

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